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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 991

JERRY G. SUMMERLIN,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Jerry G. Summerlin, prays that a writ of certiorari be issued to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the office of the Clerk of that Court on November 3, 1964, affirming the judgment of conviction entered by the United States District Court for the District of Columbia on January 20, 1964, after a jury trial, during the period of December 9, 1963 through December 16, 1963; and to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit denying petitioner's motion for rehearing *en banc* entered in the office of the Clerk of that Court on January 13, 1965, affirming the judgment of the United States Court of Appeals for the District of

Columbia Circuit entered on November 3, 1964, which affirmed the judgment entered by the United States District Court for the District of Columbia on January 20, 1964, after a jury trial during the period of December 9, 1963, through December 16, 1963.

CITATIONS AS TO OPINIONS BELOW

The petitioner was found guilty by a jury on two counts of armed robbery in violation of Title 22, Section 2901 of the District of Columbia Code, 1961 Edition, as amended, and two counts of assault with a dangerous weapon in violation of Title 22, Section 502 of the District of Columbia Code, 1961 Edition, as amended, and one count of carrying a dangerous weapon without a license in violation of Title 22, Section 3204 of the District of Columbia Code, 1961 Edition, as amended, after a jury trial in the United States District Court for the District of Columbia, which lasted from December 9, 1963, through December 16, 1963. Thereafter the United States District Court for the District of Columbia did on January 20, 1964, enter a judgment of guilty upon the verdict of the jury for violations of the offenses above-referred to herein and thereafter the United States District Court for the District of Columbia imposed a sentence upon petitioner for a term of two to seven years. This was a single sentence imposed by the Court upon petitioner covering petitioner's conviction by the jury on all five counts contained in the indictment. Thereafter petitioner noted an appeal to the United States Court of Appeals for the District of Columbia Circuit, and on November 3, 1964, that Court affirmed the judgment of the District Court below appealed from in this cause in case No. 18,407, in the United States Court of Appeals for the District of Columbia Circuit. Thereafter on November 18, 1964, petitioner moved for an extension of time for filing a petition for rehearing *en banc*. On November 27, 1964, petitioner filed his petition for rehearing *en banc;* and on January 13,

1965, the United States Court of Appeals for the District of Columbia Circuit by per curiam order denied petitioner's petition for rehearing *en banc*.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the United States District Court for the District of Columbia below was entered on November 3, 1964; and the order denying petitioner's petition for rehearing *en banc* was entered on January 13, 1965. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the action of the trial Court in granting a judgment of acquittal to the co-defendant Garrett at the conclusion of the Government's case in chief, and in view of the manner in which the same was done and stated to the jury, create prejudice against petitioner, and the failure of the trial judge to *sua sponte* thereafter grant petitioner a mistrial, violate the Fifth Amendment's due process clause?

2. Did the failure of the trial Court to order a severance during the course of the trial *sua sponte* as the evidence in the case unfolded constitute such a prejudice to the rights of petitioner as to violate the Fifth Amendment's due process clause?

3. Did the trial Court's failure to instruct the jury properly during the trial of the case below, and particularly concerning burdens of proof, that although the prosecution must prove its case beyond a reasonable doubt, the petitioner's defense of alibi, need only be sufficient to raise a reasonable doubt of guilt, violate the Fifth Amendment's due process clause?

4. Did the absence of objections to the instructions of the trial Court generally, during the trial of the case below, and particularly the failure of petitioner's defense counsel below to object to the failure of the trial Court to instruct the jury concerning necessary degrees of proof to be established before guilt could be found, and the trial Court's further neglect to instruct the jury as to the degree of proof necessary as to the defendant's defense of alibi, constitute "plain error" and prejudice to petitioner, in violation of the Fifth Amendment's due process clause?

5. Was the petitioner denied his fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States due to the patent incompetency of his defense counsel during the trial in the Court below?

STATUTES INVOLVED

The statutes involved are:

Title 22, Section 2901 of the D. C. Code—Whoever by force or violence whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another person anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (March 3, 1901, 31 Stat. 1322, ch. 854, Section 810)

Title 22, Section 502 of the D. C. Code—Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (31 Stat. 1321, Section 804).

Title 22, Section 3204 of the D. C. Code—No person shall within the District of Columbia carry either openly

or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in Title 22, Section 3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. (July 8, 1932, 47 Stat. 651, ch. 465 Section 4; November 4, 1943, 57 Stat. 586, ch. 296, Aug. 4, 1947, 61 Stat. 743, ch. 469; June 29, 1953, 67 Stat. 94, ch. 159, Section 204 (c).)

Fifth Amendment to the Constitution of the United States—No person shall * * * * in any criminal case * * * * be deprived of life, liberty or property without due process of law.

Sixth Amendment to the Constitution of the United States—In all criminal prosecutions the accused shall * * * * have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner, Jerry G. Summerlin, white, was charged in a five count indictment jointly with a co-defendant, James A. Garrett, a negro, alleging two counts of armed robbery, two counts of assault with a dangerous weapon, and one count of carrying a dangerous weapon.

The Government presented its case against petitioner and the co-defendant Garrett alleging that on to-wit July 28, 1963, petitioner and Garrett committed a robbery of the Miles-Long Sandwich Shop at 511 Morse Street, N. E. in the District of Columbia; that the victims of the robbery were Ellis Levy and Sidney Levy, proprietors of the

business establishment. The government contended that petitioner took two attache cases containing money from the alleged victims. The Government further contended that petitioner had a mask in the nature of a lady's nylon stocking over his face, and that after menacing the alleged robbery victims, Ellis Levy and Sidney Levy with a dangerous weapon, to-wit a pistol, that he departed the premises and ran to a white automobile, in which was seated a colored man as the driver, waiting in the same. That thereafter these two men drove off.

The Government contended further that later that day the alleged white car drove on to a food store parking lot and that simultaneously at that time a yellow Cadillac drove on to the same food store parking lot, it being driven by the defendant Garrett. Government witnesses further contended that the petitioner and the co-defendant Garrett removed two attache cases from the white car and placed them in the trunk of the yellow Cadillac, and the Government further contended that petitioner thereafter got into the white car and drove off, and the co-defendant Garrett got into the yellow Cadillac and drove off.

Government witnesses testified further that petitioner was arrested 32 days later. At the conclusion of the Government's case in chief after the testimony of some 14 or 15 witnesses produced by the prosecution, the trial Court below directed a judgment of acquittal on all five counts of the indictment as to the co-defendant Garrett, and the trial Court advised the jury that the case would resume as to the petitioner Summerlin.

During the course of the Government's case in chief, the record is replete with a void on the part of petitioner's defense counsel to protect his rights and is replete with a continuous recordation of utter failure and neglect to cross-examine the Government witnesses on behalf of petitioner. The record is replete with instances and occa-

sions where petitioner's defense counsel failed to interpose objections, when the same could and should have properly been made either to testimony elicited by the prosecutor from Government witnesses on direct examination, or to testimony elicited by Garrett's counsel on cross-examination of government witnesses, when the same adversely affected the rights of petitioner herein. The record is clear that during the direct examination of the Government witnesses the petitioner's defense counsel were apparently mute and unconcerned, and the record is further clear that during the cross-examination of Government witnesses by defense counsel for the co-defendant Garrett, petitioner's counsel were again apparently mute and unconcerned as to the rights of petitioner in this serious case. It is particularly remarkable, that petitioner's defense counsel were mute and unconcerned and failed to interpose normal, natural and proper objections on many and numerous occasions to the cross-examination of Government witnesses by counsel for the co-defendant Garrett, which cross-examination did not concern the co-defendant Garrett, and had nothing to do with his activities, all of this, during that time, redounding to the detriment and prejudice of petitioner herein in the presence and eyes of the jury.

At the conclusion of the Government's case in chief, the Court granted a judgment of acquittal and a directed verdict of not guilty on all five counts of the indictment as to the co-defendant, James A. Garrett. The trial Court below made statements to the jury regarding the absence of the co-defendant Garrett from the case, and notwithstanding the efforts of the trial Court to prevent prejudice therefrom to petitioner, it is respectfully submitted by petitioner herein that this action of the trial Court did prejudice him to the extent of warranting a mistrial.

Thereafter the petitioner presented his defense through four witnesses including himself. The testimony on behalf of petitioner unequivocally set forth and established an

alibi indicating petitioner's complete and total disassociation with the offenses charged against him in the indictment, at both the time and place of their alleged occurrence.

Thereafter the Court charged the jury, which petitioner submits was erroneous and to his detriment and prejudice. Petitioner submits that the trial Court in its charge failed to instruct the jury adequately concerning burdens of proof. Petitioner submits further, that the trial Court neglected, to his detriment and prejudice, to instruct the jury concerning the necessary degrees of proof to be established before guilt could be found, and further, neglected to instruct the jury as to the degree of proof required that the jury must and need consider in their deliberations concerning petitioner's defense of alibi as an effective defense in his own behalf. Petitioner states that the failure and neglect of the trial Court below in its charge to the jury constituted "plain error". Petitioner submits further, that the failure of petitioner's defense counsel to submit instructions to the Court for its consideration concerning defendant's rights and defense was "plain error"; and further, that the failure and neglect of petitioner's defense counsel to interpose objections to the trial Court's charge at the conclusion thereof was "plain error".

That upon completion of the Court's charge to the jury, the case was submitted to them for determination of the guilt or innocence of petitioner herein. The jury returned a verdict of guilty on all five counts of the indictment on which petitioner was charged therein.

Thereafter on December 21, 1963, petitioner's defense counsel filed a motion for a judgment of acquittal or in the alternative a new trial; and the said defense counsel failed to pursue the same, actually withdrawing said motion by praecipe on December 27, 1963; thus, said de-

fense counsel failed to pursue these motions to their ultimate, in defense of petitioner's rights in this case.

Thereafter the trial Court entered judgment, imposing a sentence of from two to seven years on petitioner, upon the jury's verdict of his guilt on all five counts of the indictment.

Petitioner submits that he was denied his fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States, due not only to the prejudice caused him by errors of the Court, and "plain error" committed during the trial of his case, but further due to the patent incompetency of his defense counsel during the trial of his case below.

REASONS FOR GRANTING THE WRIT

I

Petitioner submits that the trial Court below erred in not granting him a mistrial *sua sponte* at the conclusion of the Government's case in chief, after the co-defendant Garrett was acquitted. In light of the manner in which the Court dismissed the case as to the co-defendant Garrett, as reflected by the record, proceeding with the trial of the petitioner alone constituted violation of the Fifth Amendment's due process clause.

The record of the trial below clearly reveals that counsel for the defendant Garrett conducted practically all of the cross-examination of Government witnesses who testified at the trial, and cross-examination was neglected by petitioner's defense counsel. Petitioner submits that the trial Court must have been aware that most of the testimony elicited on cross-examination of Government witnesses by counsel for the co-defendant Garrett, did not even concern his client, but on the contrary reflected upon petitioner and created a positive aura of prejudice to

petitioner as a defendant in this case. Yet, during all of this time, neither did petitioner's counsel nor did the Court *sua sponte* on its own motion see fit to interpose objections to such cross-examination; nor was the same cured by way of instructions to the jury that the testimony being elicited on cross-examination by Garrett's counsel should not be considered by the jury as applying to petitioner, Summerlin, by only as to the defendant Garrett. Petitioner submits that the Court, itself, on hearing such a cross-examination in its presence by Garrett's defense counsel should have *sua sponte* informed the jury that it applied only to the defendant Garrett, *a fortiori*, since petitioner's defense counsel did neither object to the same nor request the Court to so instruct the jury accordingly. The record will reflect that petitioner was particularly prejudiced when defendant Garrett's counsel insisted on compelling the Government to produce the lady's nylon stocking mask as evidence during cross-examination, when the same by no stretch of the imagination, according to the Government's case, could have been applicable to the defendant Garrett. Petitioner further submits that there is a grave question of the propriety of the admission of the so called nylon stocking mask into evidence, since no chain of possession of the same as a Government exhibit was unequivocally established prior to its admission, that is, from the time of allegedly finding the same by the police, to its admission into evidence at the trial, and all of this was done without objection by petitioner's defense counsel. The admission into evidence of this nylon stocking mask alone, as evidence against petitioner Summerlin, under these circumstances, was gross error, and this fact alone, it is submitted, warranted the trial judge to *sua sponte* declare a mistrial. See the case of *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946) wherein the Court said,

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial

for the purpose of assuring its proper conduct of the determining questions of law."

Also see *Wrightson* vs. *United States*, 222 F 2d 556, 95 U.S. App. D.C. 390.

II

Petitioner submits that during the presentation of the Government's case in chief conditions arose therein which should have made it obvious to the trial Judge to order a severance of trial of the petitioner herein from that of the co-defendant Garrett. The record of this case clearly reveals that the trial Court in the interests of justice should have unhesitatingly ordered such a severance so as to protect the rights of the petitioner herein. At more than one stage during the trial of this case, petitioner submits that it was the duty of the trial judge to *sua sponte* order a severance of the trial of these defendants to protect petitioner's rights under the Fifth Amendment and not violate the due process clause thereof. The record of this case obviously reveals a conflict of interest between the petitioner and the co-defendant Garrett during the course of the trial in the presentation of the Government's case in chief. Petitioner submits that where there is a conflict of interest between co-defendants during a trial, it is the duty of the trial Court to protect defendants' rights in a criminal case even to the extent of ordering a separate trial for each defendant. See the case of *DeLuna* vs. *United States* 308 F. 2d 140 (5th Cir.) (1962). Also see *Case* vs. *State of North Carolina* 315 F. 2d 743 (1963).

The trial Court should always be alert to the necessity and duty of granting a severance if the same is necessary to protect the rights of a defendant. See *Schaffer* v. *United States*, 362 U.S. 511 (1960), where the Court stated at page 516,

> "* * * We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. * * *"

Also see *United States* v. *Wortman*, 26 F.R.D. 183, 197-98 (E.D. Ill. 1960); and *United States* v. *Stein*, 140 F. Supp. 761, 766 (S.D.N.Y. 1956).

III

The petitioner interposed the defense of alibi during his trial in the Court below. The record reflects that the Court during the course of its charge to the jury, on its own initiative did not instruct the jury as to petitioner's defense of alibi; and further, petitioner's own defense counsel did not call this fact to the attention of the Court. It is significant, petitioner submits, that the prosecutor, being aware that reversible error and prejudice might occur, due to this inadvertance or failure, was the one who called to the Court's attention the omission of the instruction on the defense of alibi in the Court's charge. Petitioner complains, however, that the trial Court failed to instruct the jury properly concerning burdens of proof. Petitioner insists that as a defendant in the trial below, that by offering his defense of alibi, it is not necessary to prove his alibi, but that it need only be sufficient to raise a reasonable doubt in the minds of the jury. This position is supported and founded in the law. See *United States* v. *Panchella*, 41 F. Supp. 850, District Ct. E. D. Penna., (1941) where the Court stated that:

> "* * * * 'It is equally well settled that, where an alibi defense is presented, a failure, even in the absence of a specific request, to instruct the jury as to the degree of persuasion required is reversible error, for the reason that the jury is not furnished with a standard for determining the legal value of the evidence.' The defendant had a right, even though

> no request was made for the instruction, to have the jury fully advised as to the difference between the burden resting upon the commonwealth to establish guilt, and that resting on the defendant with respect to the alibi set up."

This point obtained in the case of *Reavis* v. *United States*, 93 F. 2d 307, CCA—10th (1937). In the absence of a jury instruction on this point, it would be logical for a jury to assume that the two different narratives, made respectively in behalf of the Government and in behalf of the defendant, occupy equal footing before the jury, to the extent that the same measure could be used in evaluating both factual narratives.

This would be a prejudicial assumption because the prosecution must prove its case beyond a reasonable doubt in order to succeed, and establish petitioner's guilt, whereas the defense need only present sufficient evidence supporting an alibi to raise a reasonable doubt as to guilt. It is obviously improper for the jury to select as true the prosecution's narrative over the alibi narrative by a mere preponderance in a criminal case, and it is therefore a prejudicial error to send the case to the jury without instructing them on this point which is vital to a correct verdict.

Also, see *MacFarland* v. *United States*, 174 F. 2d 538, 85 U.S. App. D.C. 19 (1949) and *Cline* vs. *United States*, 20 F. 2d 494, CCA—8th (1927) where the Court stated,

> "Court, feeling duty to review facts for purpose of aiding jury in correct understanding, must do so in fairness to both litigants, and may not state facts on one side of issue only."

IV

Petitioner submits that the record is replete with numerous instances of error during the course of the trial

which should have been noticed and determined as "plain error" by the United States Court of Appeals for the District of Columbia Circuit and declared accordingly by that Court in the interests of justice and to protect petitioner's rights herein.

Petitioner submits that "plain error" was apparent at the conclusion of the Government's case in chief, when the trial Court failed to declare a mistrial. Also petitioner submits that "plain error" obtained in the Court's failure and refusal to order a severance on its own motion during the course of the presentation of the Government's evidence in its case in chief. Petitioner submits further that the charge of the Court contained elements which the appellate Court below should have readily recognized and denominated as "plain error" to the end of protecting petitioner's rights in the premises. Petitioner urges further that failure of the trial Court to instruct the jury concerning the necessary degrees of proof to be established by the Government before guilt could have been found, and the Court's further failure to instruct the jury as to the degree of proof needed, attending defendant's defense of alibi, all for the consideration of the jury, constituted "plain error" to the prejudice of the petitioner.

Petitioner submits that failure of the appellate court below to note the existence of "plain error" and to accordingly recognize and act upon the same, that is, reversing the judgment of the trial Court below, violated petitioner's rights under the Fifth Amendment's due process clause; and the appellate court failed to act in conformity with Rule 52(b) of the Federal Rules of Criminal Procedure in not recognizing and acting upon "plain error" committed in the trial Court below all to the detriment and prejudice of the petitioner. It is an immutable principle that an appellate court has not only the right, but the duty to correct "plain error" which redounds to the detriment of the defendant. See *Wrightson* vs. *United*

States, supra. In the case of *Meadows* v. *United States*, 82 F. 2d 881, 65 App. D.C. 275, (1936) the Court stated:

> "If plain error vital to the defendant has been committed, it may be noticed and corrected on appeal, notwithstanding absence of objection and exception (Rules of Practice and Procedure in Criminal Cases, rule 9, 28 U.S.C.A. following section 723a; Supreme Court Rules, rule 8, 28 U.S.C.A. following section 354)."

and also in *State* vs. *Williams*, 189, A 2d 193, Supreme Court of New Jersey (1963) the Court stated,

> "Plain error is error possessing clear capacity to bring about unjust result."

Notwithstanding the fact that petitioner's defense counsel in the trial below failed to interpose objections and failed to note exceptions to the charge of the trial Court below, "plain error" should have been found by the United States Court of Appeals for the District of Columbia Circuit and that Court should have accordingly reversed the judgment of the trial Court below. Other cases approving review where no exception has been taken include *Barry* v. *United States*, 287 F. 2d. 340, 109 U.S. App. D. C. 301 (1961); *United States* v. *Millpax, Inc.*, 313 F. 2d. 152, CCA-7th (1963); *Brown* v. *United States*, 314 F. 2d. 293, CCA -9th (1963); *Silber* v. *United States*, 370 U.S. 717, 82 S. Ct. 1287 (1962); *Durham* v. *United States*, 237 F. 2d. 760, 99 U.S. App. D.C. 132 (1956); and *Harris* v. *United States*, 299 F. 2d. 931 112 U.S. App. D.C. 100 (1962)

V

Petitioner submits that he was denied his fundamental rights under the Fifth and Sixth Amendments to the Constitution of the United States due to the patent incompetence of his defense counsel during the trial of his case in the trial Court below.

The right of defendant to adequate and competent counsel under the Sixth Amendment of the Constitution of the United States has long been recognized. See *Glasser* v. *United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680. A classic case on this point is the case of *State* v. *Jones*, 12 Mo. App. 93, where the Court held forth at length on the duties and obligations of defense counsel in a criminal case in order to secure a fair and impartial trial for a defendant, he being entitled to receive competent and effective assistance of counsel in the protection of his rights and in his defense. Also see *Wrightson* vs. *United States*, supra.

In the case of *Scott* v. *District of Columbia*, 99 A. 2d 641, the Court held clearly that a defendant in a criminal trial is entitled to the undivided and undiluted fidelity of counsel for defense. The Court stated in *Scott* v. *District of Columbia*, supra, at page 643,

> "Like the Supreme Court in *Glasser*, we do not know just how much prejudice resulted to defendant, nor does it matter. 'To determine the precise degree of prejudice sustained by (defendant) * * * * is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser*, supra, 315 U.S. at pages 75-76, 62 S. Ct. at page 467, 86 L. Ed. 680; see also *Coplon* v. *United States*, 89 U.S. App. D. C. 103, 191 F. 2d 749, certiorari denied, 342 U.S. 926, 72 S. Ct. 363, 96 L. Ed. 690; and *Cadwell* v. *United States*, D. C. Cir, 205 F 2d. 879."

The protection of the fundamental and basic rights of a defendant in a criminal trial should be and must be always protected and vigilantly secured under our system of criminal jurisprudence to the end that all defendants, including the petitioner in the case at bar, will

be assured not only a fair and impartial trial by a jury, but that his rights under the Fifth and Sixth Amendments of the Constitution of the United States will not be meaningless. See the cases of *Minker* v. *United States*, 85 F. 2d 425, *Nigro* v. *United States*, 117 F. 2d 624, 133 A.L.R. 1128 and *Payton* v. *United States*, 222 F. 2d 794, 96 U.S. App. D. C. 1.

CONCLUSION

For the foregoing reasons stated herein, it is respectfully submitted that the writ of certiorari should be granted.

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